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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Brandon Michael Gamino,  
10 Plaintiff,  
11 v.  
12 Faith Schrouder, et al.,  
13 Defendants.  
14

No. CV-23-00239-TUC-RM

**ORDER**

15 On April 27, 2023, Plaintiff Brandon Michael Gamino, proceeding pro se, initiated  
16 this action in the United States District Court for the Eastern District of California by  
17 filing a Complaint (Doc. 1) and an Application to Proceed In Forma Pauperis (Doc. 2).  
18 Thereafter, Magistrate Judge Jeremy D. Peterson ordered that the case be transferred to  
19 the District of Arizona pursuant to 28 U.S.C. § 1391(b). (Doc. 3.) This Court has  
20 reviewed Plaintiff's Application to Proceed in Forma Pauperis and finds good cause for  
21 granting it. The Court will dismiss the Complaint with leave to amend.

22 **I. Application to Proceed in Forma Pauperis**

23 The Court may authorize the commencement and prosecution of a civil action  
24 "without prepayment of fees or security therefor" if the plaintiff submits an affidavit  
25 including a statement of all assets. 28 U.S.C. § 1915(a)(1). In proceedings in forma  
26 pauperis, officers of the court "shall issue and serve all process." 28 U.S.C. § 1915(d);  
27 *see also* Fed. R. Civ. P. 4(c)(3).

28 Plaintiff's Application for Leave to Proceed In Forma Pauperis indicates that he is

1 unemployed with an income of \$0 per month. (Doc. 2 at 1.) The Application indicates  
 2 that Plaintiff has no money in cash or in a checking or savings account. (*Id.* at 2.)  
 3 Plaintiff's Application for Leave to Proceed In Forma Pauperis will be granted.

## 4 **II. Statutory Screening of Complaints**

5 The Prison Litigation Reform Act states that a district court "shall dismiss" an *in*  
 6 *forma pauperis* complaint if, at any time, the court determines that the action "is frivolous  
 7 or malicious" or that it "fails to state a claim on which relief may be granted." 28 U.S.C.  
 8 § 1915(e)(2). "[S]ection 1915(e) applies to all *in forma pauperis* complaints, not just  
 9 those filed by prisoners." *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc);  
 10 *see also Calhoun v. Stahl*, 254 F.3d 845 (9th Cir. 2001) (per curiam).

11 A pleading must contain a "short and plain statement of the claim *showing* that the  
 12 pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8  
 13 does not demand detailed factual allegations, "it demands more than an unadorned, the-  
 14 defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678  
 15 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere  
 16 conclusory statements, do not suffice." *Id.*

17 "[A] complaint must contain sufficient factual matter, accepted as true, to 'state a  
 18 claim to relief that is plausible on its face.'" *Ashcroft*, 556 U.S. at 678 (quoting *Bell*  
 19 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible "when the  
 20 plaintiff pleads factual content that allows the court to draw the reasonable inference that  
 21 the defendant is liable for the misconduct alleged." *Id.* "Determining whether a  
 22 complaint states a plausible claim for relief [is] . . . a context-specific task that requires  
 23 the reviewing court to draw on its judicial experience and common sense." *Id.* at 679.  
 24 Thus, although a plaintiff's specific factual allegations may be consistent with a  
 25 constitutional claim, a court must assess whether there are other "more likely  
 26 explanations" for a defendant's conduct. *Id.* at 681.

27 As the United States Court of Appeals for the Ninth Circuit has instructed, courts  
 28 must "continue to construe *pro se* filings liberally." *Hebbe v. Pliler*, 627 F.3d 338, 342

1 (9th Cir. 2010). A complaint filed by a pro se litigant “must be held to less stringent  
2 standards than formal pleadings drafted by lawyers.” *Id.* (internal quotation omitted).  
3 Nevertheless, “a liberal interpretation of a civil rights complaint may not supply essential  
4 elements of the claim that were not initially pled.” *Ivey v. Bd. of Regents*, 673 F.2d 266,  
5 268 (9th Cir. 1982).

6 If the Court determines that a pleading could be cured by the allegation of other  
7 facts, a pro se litigant is entitled to an opportunity to amend a complaint before dismissal  
8 of the action. *See Lopez*, 203 F.3d at 1127-29.

### 9 **III. Plaintiff’s Complaint**

10 Plaintiff names as Defendants the Tucson Police Department and two of its  
11 officers, Sergeant Faith Schrouder and Sergeant David Hill. (Doc. 1 at 2.) Plaintiff  
12 appears to allege both diversity and federal question jurisdiction. (*Id.* at 3-4; Doc. 1-1.)  
13 As the basis for diversity jurisdiction, Plaintiff claims that he is a citizen of the State of  
14 California, Defendants are citizens of Arizona, and the amount in controversy is more  
15 than \$75,000. (Doc. 1 at 3-4.) Plaintiff also appears to allege federal question  
16 jurisdiction by noting on the civil sheet attached to his Complaint that the “U.S. Civil  
17 Statute” under which he is filing is the “Civil Rights Statute” and claiming throughout the  
18 Complaint that Defendants violated his “civil right to file [an] internal affairs claim.”  
19 (Doc. 1-1; *see also* Doc. 1 at 4.)

20 Plaintiff alleges that Sergeant Schrouder “co-conspired with other out of state law  
21 enforcement to harass” Plaintiff, illegally track him, and “attempt to run [his] vehicle off  
22 [the] road.” (Doc. 1 at 4.) Plaintiff alleges that Defendant Hill “violated [Plaintiff’s]  
23 civil rights” by “refus[ing] to take [his] internal affairs report.” (*Id.*) Instead of taking  
24 the report, Plaintiff alleges Defendant Hill “interrogated [him] after seeing the connection  
25 between” Sergeant Schrouder and “a factual innocence case from California involving  
26 police corruption and misconduct.” (*Id.*) Plaintiff further alleges that someone,  
27 presumably Defendant Hill, made “false allegations of mental health issues to deter  
28 [Plaintiff] from pursuing legal action against his officer.” (*Id.*) As damages, Plaintiff

claims that he “had to relocate due to safety concerns,” that he has suffered lost wages and expenses, and that Defendants’ actions have caused Plaintiff to have PTSD. (*Id.*) Plaintiff seeks “punitive damages” of \$250,000. (*Id.*)

#### IV. The Complaint Fails to State a Claim for Relief

By claiming that Defendants “violated his civil rights” by refusing to take his internal affairs report, Plaintiff appears to allege that Defendants are liable under 42 U.S.C. § 1983. To state a claim under § 1983, a plaintiff must allege that (1) the defendant violated rights secured by the Constitution or federal law, and (2) the defendant acted under color of State law. *Long v. County of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006). Plaintiff does not specify which constitutional right(s) Defendants deprived him of; however, Plaintiff’s allegations potentially implicate the First Amendment.

The First Amendment provides that Congress shall make no law abridging the right of the people “to petition the Government for a redress of grievances.” U.S. Const. amend. I. However, the First Amendment guarantees only that an individual may “speak freely and petition openly” and that he will be free from retaliation by the government for doing so. *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463, 465 (per curiam). “[T]he First Amendment does not impose any affirmative obligation on the government to listen” or respond to a petition. *Id.*; see also *Douglas v. Kalanta*, No. 1:21-cv-01535-JLT-EPG (PC), 2022 WL 16748728, at \*9 (E.D. Cal. Nov. 7, 2022), *report and recommendation adopted*, No. 1:21-cv-01535-JLT-EPG, 2022 WL 17834036 (E.D. Cal. Dec. 21, 2022) (“The First Amendment does not guarantee...that the government will take any action regarding the relief demanded by the petitioner.”)<sup>1</sup>

“[T]he First Amendment prohibits government officials from subjecting an individual to retaliatory actions...for speaking out.” *Hartman v. Moore*, 547 U.S. 250, 256 (2006). To state a First Amendment retaliation claim, a plaintiff must plausibly

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<sup>1</sup> The Court also notes that “[t]he police have no affirmative obligation to investigate a crime in a particular way or to protect one citizen from another even when one citizen deprives the other of liberty o[r] property.” *Gini v. Las Vegas Metro. Police Dep’t*, 40 F.3d 1041, 1045 (9th Cir. 1994) (citing *DeShaney v. Winnebago Cnty.*, 489 U.S. 189, 195–96 (1989)).

1 allege that (1) he “engaged in a constitutionally protected activity, (2) Defendants’  
2 actions would chill a person of ordinary firmness from continuing to engage in the  
3 protected activity, and (3) the protected activity was a substantial or motivating factor in  
4 Defendants’ conduct.” *Sampson v. Cnty. of Los Angeles*, 974 F.3d 1012, 1019 (9th Cir.  
5 2020).

6 Based on these standards, Plaintiff fails to state a cognizable First Amendment  
7 claim to the extent he alleges Defendants violated his civil rights by refusing to take his  
8 written report of police misconduct. Plaintiff does not allege that Defendants prevented  
9 him from orally expressing his grievances. Instead, Plaintiff’s Complaint indicates that  
10 he verbally informed Defendant Hill about his allegations of police misconduct. *See*  
11 *Rowe v. Las Vegas Metro. Police Dept.*, No. 2:21-cv-00724-JAD-BNW, 2022 WL  
12 358144, at \*3 (D. Nev. Feb. 4, 2022) (holding that the plaintiff’s right to petition a local  
13 police department “need not have been exercised in writing,” and thus the plaintiff’s “oral  
14 conversation with the defendants at the police station constituted an exercise of his right  
15 to petition for redress of grievances”).

16 To the extent Plaintiff attempts to assert a First Amendment retaliation claim,  
17 Plaintiff has not pled sufficient facts. Plaintiff appears to allege that in response to  
18 Plaintiff’s accusations of police misconduct by Defendant Schrouder, Defendant Hill  
19 “interrogated” Plaintiff and made false statements about his “mental health issues.”  
20 (Doc. 1 at 4.) However, Plaintiff provides no details about when any of the alleged  
21 events occurred, what happened during the interrogation, the content of the false  
22 allegations, to whom, how, or where Defendant Hill made the false allegations, or how  
23 the false allegations were meant to have deterred him from engaging in protected speech.  
24 Consequently, the Complaint does not contain “sufficient factual matter . . . to state a  
25 claim to relief that is plausible on its face.” *Ashcroft*, 556 U.S. at 678. Nor does it allow  
26 the Court to draw any inference that Defendant is liable for the alleged misconduct.  
27 Furthermore, Plaintiff has not shown that Defendants’ actions would chill protected  
28 speech or that these actions occurred due to a retaliatory animus for Plaintiff’s protected

1 speech.

2 Because Plaintiff has failed to state a claim on which relief can be granted, the  
3 Court will dismiss the Complaint with leave to amend. Within thirty days, Plaintiff may  
4 submit a first amended complaint to cure the deficiencies mentioned above. Plaintiff  
5 must clearly designate on the face of the document that it is the “First Amended  
6 Complaint.” The first amended complaint must be retyped or rewritten in its entirety and  
7 may not incorporate any part of the original Complaint by reference.

8 A first amended complaint supersedes the original Complaint. *Ferdik v. Bonzelet*,  
9 963 F.2d 1258, 1262 (9th Cir. 1992); *Hal Roach Studios v. Richard Feiner & Co.*, 896  
10 F.2d 1542, 1546 (9th Cir. 1990). After amendment, the Court will treat the original  
11 Complaint as nonexistent. *Ferdik*, 963 F.2d at 1262. Any cause of action that was raised  
12 in the original Complaint and that was voluntarily dismissed or was dismissed without  
13 prejudice is waived if it is not alleged in a first amended complaint. *Lacey v. Maricopa*  
14 *County*, 693 F.3d 896, 928 (9th Cir. 2012) (en banc).

15 If Plaintiff files an amended complaint, Plaintiff must write short, plain statements  
16 telling the Court: (1) the constitutional right Plaintiff believes was violated; (2) the name  
17 of the defendant who violated the right; (3) exactly what that that defendant did or failed  
18 to do; (4) how the action or inaction of that defendant is connected to the violation of  
19 Plaintiff’s constitutional right; and (5) what specific injury Plaintiff suffered because of  
20 that defendant’s conduct. *See Rizzo*, 423 U.S. at 371-72, 377. Plaintiff must repeat this  
21 process for each named defendant. If Plaintiff fails to affirmatively link the conduct of  
22 each named defendant with the specific injury suffered by Plaintiff, the allegations  
23 against that defendant will be dismissed for failure to state a claim. Conclusory  
24 allegations that a defendant or group of defendants has violated a constitutional right are  
25 unacceptable and will be dismissed.

## 26 **V. Warnings**

### 27 **A. Address Changes**

28 If Plaintiff’s address changes, Plaintiff must file and serve a notice of a change of

1 address in accordance with Rule 83.3(d) of the Local Rules of Civil Procedure. Plaintiff  
2 must not include a motion for other relief with a notice of change of address. Failure to  
3 comply may result in dismissal of this action.

4 **B. Possible Dismissal**

5 If Plaintiff fails to timely file an amended complaint in compliance with this  
6 Order, this action will be dismissed with prejudice. *See Ferdik*, 963 F.2d at 1260-61 (a  
7 district court may dismiss an action for failure to comply with any order of the Court).

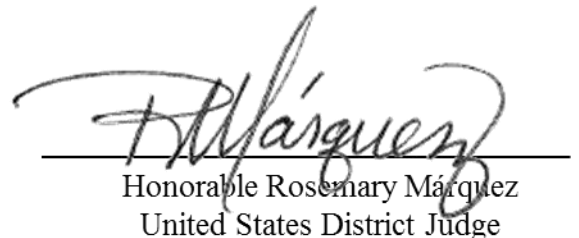
8 Accordingly,

9 **IT IS ORDERED** that Plaintiff's Application to Proceed In Forma Pauperis (Doc.  
10 2) is **granted**.

11 **IT IS FURTHER ORDERED** that Plaintiff's Complaint (Doc. 1) is **dismissed**  
12 **without prejudice for failure to state a claim**. Within **thirty (30) days**, Plaintiff may  
13 file a first amended complaint that cures the deficiencies addressed in this Order. If  
14 Plaintiff fails to file an amended complaint within thirty days, the Clerk of Court must,  
15 without further notice, enter a judgment of dismissal of this action with prejudice.

16 Dated this 23rd day of April, 2024.

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Honorable Rosemary Márquez  
United States District Judge